

UNITED STATES OF AMERICA

DEPARTMENT OF COMMERCE

**NATIONAL TELECOMMUNICATIONS
AND INFORMATION ADMINISTRATION**

WASHINGTON, D.C.

Presidential)
Spectrum Policy)
NTIA Docket No. 040127027-4027-1
Initiative)

MOTION
FOR THE CORRECTION OF PROCEDURAL INFIRMITIES
BY THE AMHERST ALLIANCE,
NICKOLAUS E. LEGGETT N3NL
AND
LEE McVEY, P.E. W6EM

THE AMHERST ALLIANCE is a nationwide citizens' advocacy group, founded on September 17, 1998 in Amherst, Massachusetts. Amherst supports Low Power Radio in particular and media reform in general.

THE AMHERST ALLIANCE will soon be submitting in this Docket a set of substantive Written Comments, signed by MELISSA S. LEAR of New York. She is Special Assistant to the President.

However, in view of NTIA's omission from the public record of the entire text of a vital report that was recently filed in this Docket, the task of drafting the present Motion has been seized by the President of Amherst. He has assumed personal responsibility for this Motion because Amherst views the unexpected and unexplained disappearance of this report from public view as a stunning violation of "due process of law" and a matter of profound gravity.

The current President of THE AMHERST ALLIANCE, Don Schellhardt of Connecticut, is an attorney with over 20 years of experience in Government Relations and 5 years of experience in trial law, including criminal cases. He holds a B.A. in Government and English from Wesleyan University and a Juris Doctor degree from George Washington University. He is also a Member of the Bar in two States.

NICKOLAUS E. LEGGETT N3NL of Virginia is a research analyst, technical writer, inventor, co-author (with his wife Judith Leggett) of several award-winning scientific papers and an Amateur Radio Service operator.

LEE McVEY, P.E. W6EM of Florida is a Professional Engineer, with experience at Federal Government agencies, and an Amateur Radio Service operator.

All three parties have already submitted independent filings in NTIA Docket 040127027-4027-01. Nickolaus Leggett N3NL filed his own request for an extension of the comment period, while Lee McVey, P.E. W6EM submitted individual Written Comments and also joined THE AMHERST ALLIANCE in a 21-party Motion for a comment deadline extension.

The Notice of Inquiry in this Docket concerns NTIA's implementation of the Presidential Spectrum Policy Initiative (PSPi), which was launched by President Bush in an Executive Memorandum on May 29, 2003. The Executive Memorandum was released to the public on June 5, 2003.

To date, all requests for an extension of the comment period have been denied by NTIA. In the case of the 21-party Motion, NTIA considered the proposed comment period extension for less than two days before denying the Motion.

The three parties to the current Motion hereby reiterate *both* their support for a comment period extension *and* their assertions that the presently scheduled comment period is clearly inadequate in light of the profound issues involved.

Having reiterated these previously expressed points, THE AMHERST ALLIANCE, Nickolaus Leggett and Lee McVey now submit the present Motion to seek correction of two *additional* procedural infirmities.

THE MISSING-IN-ACTION REPORT

NTIA is obligated by law to include, in the publicly viewable record of filings in NTIA Docket 040127027-4027-01, as posted for commenting parties and others at <http://www.spectrumreform.ntia.doc>, the *full text* of the report which was submitted to the NTIA a filing by the Center for Strategic & International Studies (CSIS) in Washington, D.C. This report, entitled

“Spectrum Management For The 21st Century”, was written by CSIS in October of 2003 and apparently submitted to NTIA on March 12, 2004 (although the filing was not posted for public inspection and review until the following week).

Unfortunately, the publicly viewable record of this filing includes *only* the text of the March 12 cover letter. Not one word of the report itself was included in NTIA’s publicly viewable record of the CSIS filing, even though the cover letter from CSIS makes it clear that CSIS intends and expects its report to be considered as part of the basis for whatever decisions NTIA may make in this Docket.

While *any* evidence which is submitted for the *public* record, in a *public* proceeding, should be *publicly viewable*, in full, inclusion of the entire CSIS report may be particularly important. We make this statement because there is *persuasive* evidence -- not convincing evidence, but persuasive evidence -- that representatives of CSIS may have influenced the shaping of the Executive Memorandum which launched the PSPI, and may, possibly, have influenced the NTIA’s NOI as well.

For one thing, we are struck by the similarity in titles:

**“Spectrum Policy For The 21st Century” (Presidential Executive Memorandum,
June 2003)**

“Spectrum Management For The 21st Century” (CSIS report, October 2003)

**“United States Spectrum Management Policy For The 21st Century” (NTIA
Docket, February 2004)**

In addition, having had the opportunity to read *only* the Executive Summary of the CSIS report, we have nevertheless noticed some significant substantive similarities between the philosophical underpinnings of the President's Executive Memorandum and the apparent philosophical underpinnings of the CSIS report. Of course, this *could* be a coincidence.

As indicated, we are not convinced that CSIS/White House interaction actually occurred. Nor are we stating, or implying, that such interaction would be unlawful or improper if it did occur. Subject to certain legal restrictions, anyone may lobby the White House and/or NTIA.

However, when the evidence* presented during such lobbying becomes the basis for an official Notice Of Inquiry and/or a Notice of Proposed Rulemaking, then *that evidence* must either be disclosed to the public -- so that commenting parties are able to address it -- or else the evidence must be disregarded by the applicable government agency in its decision-making. Under most non-emergency conditions, the information and arguments being considered by a regulatory agency must be *either disclosed to the public -- or ignored.

***If* in fact information and arguments presented by CSIS have influenced Executive Branch decision-making on the PSPI, then it becomes *even more vital* for commenting parties to have full, free and immediate access to the case which CSIS has made.**

Although nothing in the publicly viewable record of the CSIS filing advises commenting parties to visit www.csis.org in order to read the

omitted report, Don Schellhardt of THE AMHERST ALLIANCE visited the CSIS Web Site, on his own initiative, in an effort to find the Missing-In-Action report. Unfortunately, the CSIS Web Site posts *only* the report's Executive Summary. Parties who want to read the rest of the report are required to pay \$16.95 -- and, presumably, must also wait a certain number of days to receive it.

Given that the CSIS filing was submitted on March 12, and posted by NTIA on March 15, *and* given that the current comment deadline is March 18, the time lag alone would effectively defeat attempts by commenting parties to read, review and address the CSIS report in what is left of the current comment period. In addition, it is legally questionable for NTIA to effectively require members of the *public* to pay \$16.95 apiece, to a *private* merchandiser, in order to read something which has been knowingly placed in the *public* record.

We realize that CSIS might prefer to avoid "giving away" free access to a report that it can otherwise sell for \$16.95 per copy. Nevertheless, this is one of those tradeoffs that commenting parties sometimes have to accept.

Barring emergency conditions, certain clearly pressing national security concerns and/or confidential proprietary information, none of which are a factor here, Federal Government agencies are required by law to base their decisions *solely* upon a record which is fully viewable by the public. They are *also* usually required by law to make documents in that public record viewable by the public in time to allow a reasonable opportunity for public comment -- *before* the agency's decisions are made.

Therefore: When a commenting party asks a government agency to accept evidence it has submitted, and to make that evidence part of the basis for a decision by that agency, then the commenting party must accept that the submitted evidence will become part of “the public domain” -- viewable “for free” by anyone who looks up the public record. Surely this legal fact of life will not come as a surprise to the former United States Secretary of Energy who co-signed the CSIS filing.

In any event, action should be taken by NTIA, *immediately*, to place the *full text* of the CSIS report into the public record of NTIA Docket 040127027-4027-01.

THE MISSING-IN-ACTION *REPLY* COMMENTS PERIOD

In addition to denying two different requests extend the time period for submission of *Written* Comments, NTIA has apparently neglected to establish any kind of time period *at all* for the submission of *Reply* Comments.

That is: Although the time frame is seriously inadequate, NTIA has at least provided *some* kind of a time period for the submission of Written Comments on NTIA’s Notice Of Inquiry. However, NTIA has not provided *any* kind of a time period for Written Comments on the Written Comments.

For example, even if the Missing-In-Action CSIS report is posted on NTIA’s Spectrum Reform Web Site today (March 17),

Amherst, Nickolaus Leggett and Lee McVey, and other potential commenting parties, will have only one day to review and address the report. Further, if (as often happens in a regulatory proceeding) one or more commenting parties wait until the last possible minute to file their Written Comments, other commenting parties will have no time at all to rebut, endorse or otherwise address those last-minute filings.

To avoid such a potential preclusion of exchanges *between* commenting parties, Federal regulatory agencies *routinely* provide a *Reply Comments* period. The normal length is 30 days, although longer Reply Comments periods are not unknown.

It is not too late for NTIA to establish a Reply Comments period -- and we urge it to do so. In this regard, we note that, except when an emergency rulemaking is involved, Federal regulatory agencies generally regard establishment of a Reply Comments period as a necessary step for compliance with the Administrative Procedure Act.

ANSWER TO A POSSIBLE ASSERTION

In its 2-day denial of the Motion by 21 parties for extension of the *Written* Comments period, NTIA stated, through its General Counsel, that a comment deadline extension would not permit NTIA to meet a June 1, 2004 deadline for completing its deliberations. That deadline, it was noted, has been set by the

President of the United States, in his previously referenced Executive Memorandum.

Naturally, it occurs to the signatories of this Motion that the same rationale might be employed to justify denial of these additional requests. In case this possible response is being considered, we ask NTIA to first consider two important points.

(A) In the event that an injunction is sought against actions which are undertaken as a result of NTIA's deliberations in this Docket, the court will decide the Motion for an injunction in general accordance with the "equity" traditions of Americanized British common law. In an "equity" proceeding, one question which might arise is whether the plaintiff has "clean hands" (a moral status which includes, among other characteristics, a record of having made a "good faith" effort to exhaust all other remedies before going to court). As a tangential aspect of this inquiry, the court might also consider whether *the Defendant* has made a "good faith" effort to avoid the conflict which is being laid before the court.

Certainly NTIA's peremptory consideration and dismissal of the 21-party Motion for an extended Written Comments period will work to NTIA's detriment in any future judicial comparison of which party has "clean hands". An equally peremptory consideration and dismissal of the present Motion will further undercut the standing of NTIA, and under some conceivable circumstances the standing of the entire Federal Executive Branch, in a possible court conflict over a possible injunction request.

It may also be relevant, in such a possible proceeding, for the court to consider which party has contributed the most to the alleged urgency of the present deliberations in this Docket. The Executive Memorandum which initiated the PSPI was issued by President Bush in late May of 2003, released to the public in June of 2003 and made the subject of NTIA's Notice Of Inquiry in February of 2004. Thus, NTIA waited 8 months -- two thirds of the total time frame established by the President -- before *beginning* the solicitation of public comments. Then NTIA limited the public to 6 weeks for *Written* Comments, with no opportunity for Reply Comments at all.

Therefore: NTIA *itself* has created an artificial urgency, which it has then used to justify denying adequate time for the preparation and

development of effective input from affected parties. We ask NTIA: Why should commenting parties be asked to pay the price for NTIA's

leisurely pace from June through January? Why should commenting parties be allowed only 1 week to prepare input for every 5 weeks that NTIA

took to develop the NOI?

(B) More importantly, NTIA needs to recognize that even the order of a President is not The Last Word in the law.

A President's authority to set deadlines for Executive Branch agencies, like his or her ability to issue other orders, is limited to what the

statutes *and* the Constitution allow. As the old saying goes: "Your right to swing your fist ends where my nose begins." A President's

authority, however, is even more restricted. Before a President can even start to swing the metaphorical fist, he or she must first find a statutory

and/or Constitutional provision which authorizes that action. Thus, a President is both forbidden to *exceed* the limits of the law *and* forbidden to

act without an identifiable legal authorization.

In *this* case, a continued NTIA policy of ending all public input on the PSPI on March 18 -- in an artificial, *self-created* rush to meet the

President's deadline -- would deprive commenting parties of "due process of law". Given the overall factual context, including the total (and

unexplained) absence of a Reply Comments period, NTIA would be in violation of the Administrative Procedure Act. Further, since the

Administrative Procedure Act is in substantial part a codification of various court decisions which interpreted the "due process" clause of the

Constitution, NTIA would be violating the Constitution as well.

To cite a Presidentially established deadline as an excuse for these violations is to argue, implicitly, that the will of the President of the

United States is, and should be, enough to override *both* the Administrative Procedure Act *and* the Constitution itself.

Does NTIA *really* want to continue to assert, or even imply, that the President, and/or the President's agents, need not heed "due process of law"?

Of course, failure to make the CSIS report publicly viewable would add to the damage caused by the truncated comment period. In

addition, in the case of the Missing-In-Action CSIS report, there is no connection at all to the date of the President's deadline.

CONCLUSIONS

For the reasons set forth herein, THE AMHERST ALLIANCE, Nickolaus E. Leggett and Lee McVey urge NTIA to:

- (1) Act *immediately*, as required by "due process of law", to place the *full text* of the CSIS report into the publicly viewable

record of the filings in this Docket;

And

- (2) Establish a *Reply* Comments period of at least 30 days, as also required by “due process of law”.

Further, we reiterate our respective requests for extension of the *Written* Comments period. We call upon NTIA to reconsider,

in light of the points raised within this new Motion, its previous denial of Nickolaus Leggett’s request for a deadline extension and its peremptory

denial of the Motion filed by Amherst, Lee McVey and 19 other parties.

Respectfully submitted,

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Dated: _____

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